ENVIRONMENTAL QUALITY COUNCIL
December 2, 1999
Original Minutes with Attachments

COUNCIL MEMBERS PRESENT

Sen. William Crismore, Chair
Rep. Kim Gillan, Vice Chair
Rep. Paul Clark
Sen. Mack Cole
Rep. Monica Lindeen
Sen. Bea McCarthy
Sen. Ken Mesaros
Rep. Doug Mood
Sen. Spook Stang
Rep. Bill Tash
Sen. Jon Tester
Rep. Cindy Younkin
Mr. Tom Ebzery
Ms. Julia Page
Mr. Jerry Sorensen
Mr. Howard Strause

COUNCIL MEMBERS EXCUSED

Ms. Julie Lapeyre

STAFF MEMBERS PRESENT

Mr. Todd Everts
Ms. Krista Lee
Mr. Larry Mitchell
Ms. Mary Vandenbosch
Ms. Judy Keintz, Secretary

VISITORS' LIST

Attachment #1

COUNCIL ACTION

- Approved minutes from EQC meeting of September 22 and 23, 1999.
- Adopted the Eminent Domain Subcommittee Work Plan.
- Adopted meeting schedule times for Subcommittee/Committee.
- Set next meeting date for January 21, 2000 in Missoula. The March meeting will be held in Billings an the remainder of the meetings in Helena.

I CALL TO ORDER AND ROLL CALL

CHAIRMAN CRISMORE called the meeting to order at 8:30 a.m. Roll call was noted; MS. LAPEYRE was excused. **(Attachment #2.)**

II ADOPTION OF MINUTES

Motion/Vote: SEN. MCCARTHY MOVED THAT THE MINUTES OF THE SEPTEMBER 22 AND 23, 1999 EQC MEETING BE APPROVED AS WRITTEN. THE MOTION CARRIED UNANIMOUSLY.

III ADMINISTRATIVE MATTERS

A. Administrative Rules Oversight Summary

MR. EVERTS provided a document entitled "Department of Environmental Quality (DEQ) Rule Notice Summary", **Exhibit 1**. He explained that this document contained the proposed notices for DEQ rules for this quarter. The Department of Natural Resources (DNRC) and the Department of Fish, Wildlife and Parks (FWP) do not have current proposed notices of rule amendments or changes.

The DEQ noticed a rule on November 18th that would raise the certification fee for waste water operators from $30 to $70. Funds have been insufficient to pay for the program. A public hearing on the proposed rule is set for December 14th at 1:30 p.m. The deadline for comments is December 17th.

B. EQC and Subcommittee Budget Update and Proposal

MR. EVERTS provided the Council with a draft EQC budget, **Exhibit 2**. He noted that meetings have been scheduled for Missoula and Billings. The remainder of the meetings have been scheduled for Helena in order to stay within the draft budget. The EQC budget is $56,000 and covers subcommittee meetings which are generally held the day before EQC meetings. This budget provides for six subcommittee and six EQC meetings. It will be necessary to obtain a budget supplement from the Legislative Council for subcommittee meetings. Since the Eminent Domain Subcommittee is a joint subcommittee with the Law, Justice and Indian Affairs Committee, supplemental funds will be requested for this subcommittee. If the Eminent Domain Subcommittee is successful in obtaining additional funding, this would allow the MEPA Subcommittee to meet on four occasions outside of the EQC meeting schedule. The Legislative Council is meeting in January and this would be the appropriate time to make the request for additional funds.

MR. EVERTS added that $100,000 is set aside for over-expenditures or budget supplementals for interim committees. The supplemental funds would not be taken from another interim committee.

SEN. MCCARTHY explained that the MEPA Work Plan would require additional meetings. SEN. COLE agreed that the Eminent Domain Subcommittee should seek supplemental funding from the Legislative Council.

MR. SORENSEN remarked that mileage expenses would not be an additional expense when the subcommittees met the day before the EQC meeting. MR. EVERTS acknowledged that there may be some overlap of expenses.

REP. GILLAN suggested that the cost of using the MetNet for public hearings be considered. This would involve more people from rural communities. MR. EVERTS acknowledged that this is an option and agreed to review the costs and possibility of using the MetNet.

IV SUBCOMMITTEE UPDATES

A. Eminent Domain Subcommittee

SEN. COLE remarked that the Eminent Domain Subcommittee has approved their work plan, **Exhibit 3**. Additions and changes may be necessary following the public hearings. They have identified specific issues for further study. At the Subcommittee meeting of the previous day, the Montana Department of Transportation (MDOT) presented information regarding its use of eminent domain powers. Also, a panel presentation was made regarding pipeline bonding, mitigation measures and standards.

Motion/Vote: MR. SORENSEN MOVED THAT THE EQC ADOPT THE EMINENT DOMAIN SUBCOMMITTEE WORK PLAN. THE MOTION CARRIED UNANIMOUSLY.

B. MEPA Subcommittee

SEN. MCCARTHY explained that since the last EQC meeting, the MEPA Subcommittee has met in Great Falls and in Helena. Public hearings were held at each of the meetings.

MR. EVERTS reported that at the subcommittee meeting of the previous day there were two panel discussions. One addressed substantive and procedural implementation of MEPA by certain state agencies. Two of the panelists explained that their departments administer MEPA substantively and procedurally and one panelist explained the agency for which he works administers MEPA procedurally.

MR. EVERTS further remarked that using MEPA substantively would include an agency conditioning a permit or license beyond its permitting purview. The DEQ, under court order, is required to use MEPA substantively for the Metal Mine Reclamation Act and the Coal Act. He added that **John North, Attorney for DEQ,** explained that MEPA had been used substantively on an infrequent basis. The situations where MEPA was used beyond the authority in the permit included noise mitigation and protection of school children in traffic patterns. The FWP has used MEPA substantively in connection with a zoo and menagerie in Kalispell. This decision was upheld by the district court.

The other panel discussion addressed MEPA implementation. Three agency employees explained that they view MEPA differently, even though the agencies operate under the same rules.

The MEPA Subcommittee staff will communicate with these state agencies and develop criteria for the cost and benefits of the MEPA process. Statutes will be reviewed to note problems that force agencies into using MEPA substantively as opposed to using their permitting statutes. The subcommittee also directed the Montana Consensus Council to proceed with a detailed survey on public participation.

REP. GILLAN was curious as to the flavor of the public hearings. SEN. TESTER explained that the subcommittee is hearing a variety of responses. Some persons want the MEPA statutes left alone while others want the statutes completely changed. He believed the truth was somewhere in the middle. Hopefully, any changes made will improve the process.

SEN. MCCARTHY added that the flavor of the meetings depends upon the audience attending the hearing. In Libby, they heard concerns about mining and logging industries. In Great Falls, the environmental community was very well represented.

C. Water Policy Subcommittee

SEN. MCCARTHY stated that the subcommittee held a public hearing in Great Falls and there was a good turnout for this hearing. The purpose of the hearing was to receive comments regarding the DEQ proposal to revise the concentrated animal feeding operation (CAFO) general permit. The Water Policy Subcommittee has forwarded the comments that were received to the DEQ.

The subcommittee also requested that the Bureau of Land Management address its efforts to mitigate impacts of river recreation as a result of the approaching Lewis and Clark Bicentennial celebration. The subcommittee's interest concerns the impacts to riparian areas.

REP. TASH, MS. VANDENBOSCH, SEN. BECK, and SEN. MCCARTHY attended a river governance meeting in Portland. Issues regarding the future of the Bonneville Power Administration (BPA) were discussed. There will be a meeting of the four state group in Montana in April.

REP. TASH relayed his concerns about potential EPA actions with respect to Montana's TMDL law.

SEN. MCCARTHY added that their work plan will need to be revised due to the possibility of needed legislation on the CAFO proposal. MS. VANDENBOSCH remarked that before the DEQ makes a revision to its general permit for CAFOs, the strategy for managing CAFOs must be finalized. The public comment for the CAFO strategy ended in July. Comments are still needed from the EPA and should be available within the next few weeks. The DEQ's strategy can then be finalized and following this, the general permit can be finalized.

SEN. MESAROS requested that the EQC be updated on this issue. There were two separate issues at the meeting: the concern that the CAFO proposal may not cover the necessary issues for the large operations and yet it may be too comprehensive for the smaller operations in rural Montana.

Steve Pilcher, Montana Stockgrowers Association, remarked that they have had conversations with **Mark Simonich, Director of the DEQ,** and that there is a willingness to address many of the concerns

expressed by the EQC as well as the Stockgrowers Association. Following receipt of the EPA comments on the DEQ's draft strategy, negotiations will continue in order to find common ground on the noted issues.

D. Land Use/Environmental Trends

MR. SORENSEN remarked that the Land Use/Environmental Trends Subcommittee has adopted its work plan and staff has been working on their primary projects. The subcommittee will be monitoring how growth policies are being implemented in the state. Several counties have initiated growth policies and the process appears to be going pretty well. They also want to focus on the project costs and how the jurisdictions are paying for the planning. If there is a need, it is important to find funds to help the process.

The subcommittee will meet following today's EQC meeting. Representatives from Lewis and Clark County will provide an update of their growth policy. The environmental trends project will also be discussed in terms of updating the information.

There is a newly formed smart growth coalition in the state and they are interested in reviewing Montana's statutory framework for planning. The subcommittee will work with these organizations to understand their focus and to share information.

V TMDL LITIGATION UPDATE: FRIENDS OF THE WILD SWAN, INC. V. BROWNER

Art Compton, Administrator of the Planning, Prevention and Assistance Division, DEQ, reported that four constituent groups filed suit against the EPA claiming that the EPA had been remiss in its oversight of implementation of the Total Maximum Daily Load (TMDL) Program required by the Federal Clean Water Act amendments. Judge Molloy ruled in the EPA's favor on four of the issues raised but the court took issue with Count II of the litigation. Judge Molloy held that EPA's approval of the 130 TMDL allocations that Montana has completed was arbitrary and capricious. His holding was that 130 TMDLs was not sufficient. The EPA has filed, and the state supports, a Request to Reconsider by Judge Molloy. The basis is that the ruling is an error in law. The EPA has no responsibility to pass judgment on the rate at which Montana achieves its TMDL allocations. Judge Molloy reviewed the Water Quality Act amendments which created the EPA's responsibility for TMDLs. He gauged the state's progress from the mid-1970s to 1999 and believed 130 to be an inadequate amount.

House Bill 546, which created the TMDL Program, was the beginning of Montana's systematic approach toward the TMDL process for impaired streams and lakes. An infrastructure was created for a TMDL staff at the DEQ. Short of the reconsideration by the court, the DEQ has asked that the disapproval be remanded to EPA for reconsideration. This would allow the EPA to better document its approval of the list.
Since 1977, there have been 134 TMDLs developed and approved. Montana's program is voluntary in nature. The federal government, through its delegated water quality responsibilities to the state, does not regulate nonpoint sources. The DEQ's approach has been to work with watershed groups. These groups include landowners who have worked on repairing problem areas. The Statewide TMDL Advisory Group, which

includes a group of legislators and stakeholders, guides the department's actions in the program. The first group of TMDLs that have been developed will be successfully implemented on the ground.

If the EPA loses the lawsuit and an accelerated schedule is put in place for developing the remainder of the list, there will be several hundred more TMDLs necessary between now and 2007. There are approximately 800 streams that need to be addressed. An accelerated schedule would make it necessary to change the approach to TMDL development. The State of Idaho prepared computer modeling to determine how to return their impaired waters back to water quality standards. This approach is very efficient time wise, but implementation could be difficult. The DEQ believes that in working with local watershed groups, it can satisfy its responsibilities to complete this process.

MR. STRAUSE noted that the Opinion states that since 1979 Montana has developed 130 TMDLs and that there are 3,000 left to be developed. **Mr. Compton** stated that the Judge was incorrect. The DEQ has responded to that error in a brief that is being filed. The Judge took the 670 streams on the 303d list and multiplied that by the number of parameters - temperature, sediment, nutrients, etc. He assumed that each element for each stream was a separate TMDL. **Mr. Compton** added that the number of streams left to address would include approximately 700. A number of these streams will be removed from the list of impaired waters as the result of a lack of sufficient credible data, which is now required by state law in order to be listed. As the sufficient credible data is received through the monitoring programs, the streams will go back on the list so eventually all 900 impaired streams will be addressed. Their actual workload consists of working on several hundred streams before 2007. As the streams come back on the list, they have ten years to address the same. At sometime following 2007, they will have TMDLs in place for all 900 plus streams.

The Judge asked for the parties to enter into settlement negotiations under the guidance of a special master. In addition to the State, the other intervenors in the case include the Montana Wood Products Association, the Montana Farm Bureau, and the Montana Stockgrowers Association. If the State is required to accelerate its schedule, it will be necessary to change its approach.

MS. PAGE questioned whether the State had a program in place to foster the watershed groups to implement action where needed. **Mr. Compton** remarked that some of the watershed groups were in existence before the 1997 Legislation. The DEQ has worked to strengthen the groups and has also helped them to convene in drainages where needed.

MS. PAGE added that it seemed that the 130 TMDLs implemented were already in progress before the legislation. **Mr. Compton** acknowledged that of the several hundred streams that need to be addressed before 2007, a good number already have watershed groups in place. Staff is working with individual landowners in those drainages. He doesn't know whether there is a watershed group in every drainage. The staff identified 900 impaired streams but when they tried to start the implementation process they were told that they did not have the authority to do so. Their method for calculating and compiling water quality data

that identified the impaired streams was also called into question. House Bill 546 allowed for a dedicated staff and funding for the process. The first 130 TMDLs were for point discharges. They have worked on five TMDLs last year and this year that are strictly nonpoint source plans. Ninety percent of the remaining streams on the impaired waters list are impaired for nonpoint discharges.

Public Comment

Cary Hegreberg, Montana Wood Products Assoc., commented that the Statewide TMDL Advisory Group is in the process of prioritizing the water quality limited stream segments for TMDL development as specified in the law. Once the priority list is assembled, the department will be contacting the various watershed groups. The conservation districts are instrumental in the development of these TMDLs. The voluntary nature of this approach is the distinguishing factor of this program.

VI PANEL DISCUSSION: WHAT IS THE EFFECT OF THE RECENT MONTANA SUPREME COURT DECISION (MEIC V. DEQ- 1999) CONSTRUING THE ENVIRONMENTAL PROVISIONS OF THE MONTANA CONSTITUTION

Tom France, National Wildlife Federation, explained that he represented the Plaintiffs in the case, the Montana Environmental Information Center (MEIC), Women's Voices for the Earth, and the Clark Fork Coalition, in this lawsuit. This case involved a series of pump tests that were conducted as a part of the exploration program for the Seven-Up Pete Joint Venture Mine in the headwaters of the Blackfoot River. In 1995, the company applied to the DEQ to drill wells into deep aquifers underlying the mine property and to pump the water up and discharge it into the alluvium of the Blackfoot River. The deep water aquifer was heavily mineralized and the water was loaded with arsenic, zinc, and other heavy metals. His clients were concerned with the discharge and the process by which the DEQ approved that discharge. The DEQ relied on a provision that the l995 Legislature had enacted. This amendment to the Water Quality Act totally exempted water well tests from the State's nondegradation criteria and from nondegradation review. The Plaintiffs believed the blanket exemption in law was totally inappropriate because the constituent elements of the ground water that was being discharged into the alluvium violated state water quality standards. It especially violated the state's significance criteria for arsenic.

The Plaintiff's initially asked for a preliminary injunction and on the day of the hearing the company voluntarily suspended the pump test. The next summer the tests were reopened. The most significant issue they brought was a challenge under Montana's Constitution. Based on other precedent established by the Montana Supreme Court, they alleged that the discharge of arsenic laden waters to the alluvium of the Blackfoot River impacted their right to a clean and healthful environment and as such they were entitled to have the blanket exemption held unconstitutional through a process known as strict scrutiny. Under a strict scrutiny analysis, the courts apply a very rigorous evaluation to legislative enactments. Few pieces of legislation survive a strict scrutiny analysis intact at either the federal or state level.

The district court held that while they did have a right to a clean and healthful environment, they had not established harm and the court refused to engage in an analysis of the constitutional issues behind the statute. The case was argued before the Supreme Court in September of l998 and a decision was handed down in October of l999. The Court held that because the State's criteria for significant discharges of arsenic were exceeded by the Blackfoot discharges, there was harm to the environment and that harm had to be presumed. The Court recognized that there is a fundamental right enjoyed by all Montanans to a clean and healthful environment and held that a strict scrutiny test is appropriate for courts to engage in when reviewing environmental statutes. The government entity proposing the action must show that the statute or the action is a matter of compelling state interest, is closely tailored to affect that state interest, and has the least impact on the protected fundamental right. The Court did not apply this to the water quality amendments enacted in l995, rather the Court remanded the case back to the district court. The parties will be back in court to argue whether or not, under a strict scrutiny analysis, the Legislature's blanket exemption for water well tests should be held unconstitutional.

Tom France stated that he believes that Judge Sherlock will hold that the statute is unconstitutional. The fundamental problem of the amendments is that the Legislature established an entire series of activities that had no significant impact on state water quality. The problem is the categorical nature of this action. Absolute free passes for activities that may harm the environment is a statutory vehicle that the Legislature should avoid. The Court's decision is solidly grounded on Montana precedent.

John North, Chief Legal Counsel for the defendant, the DEQ, remarked that there were chemical constituents in the deep ground water that were being discharged into the alluvial gravels about 1,200 feet from Landers Fork and the Blackfoot River. Those waters did exceed standards for several constituents including manganese and arsenic. The highest concentration was manganese which is a nontoxic, noncarcinogenic pollutant. As a result, the Seven Up Pete Joint Venture asked for a mixing zone. The department processed the application. A mixing zone is an area in which water quality standards can be exceeded. The department needs to determine that it is granting a mixing zone that is of the smallest practical size and also that there will not be adverse impacts on uses. In this instance, the department determined that a 5,000 foot mixing zone would be necessary for manganese and granted two mixing zones of 4,000 and 5,000 feet, respectively. It determined that the ground water was not used by any person in that area and none of the water discharged would enter the Blackfoot River. The department determined that it would enter the Landers Fork but would be well below standards. If the constituent for which the mixing zone was created had been arsenic, the mixing zone would have been much smaller because the concentration of arsenic in the discharged ground water was much lower than the concentration of manganese. There were no adverse impacts to uses and non-noticeable impacts on the Landers Fork and Blackfoot Rivers.

This case began to define a clean and healthful environment. The issue in the case was whether or not it means no adverse change in the environment or nondegradation. The department argued that the meaning of the terms clean and healthful should be determined. While there is a provision in the Constitution that directs

the Legislature to adopt remedies to prevent degradation, it is not part of the inalienable right provision for a clean and healthful environment. The term "healthful" means that the environmental life support system should not harm human health. The term "clean" was meant to protect the uses for the environment. With regard to water this means that it needs to be aesthetically pleasing and support fish, insects, recreational uses, etc. This is the clean and healthful right of Montanans.

The Court held that the right to a clean and healthful environment includes the concept of nondegradation. The section of the Constitution that deals with nondegradation does not use the word "unreasonable" as a modifier to the term. In the Court's decision, it stated that the right to a clean and healthful environment includes the concept of being free of "unreasonable" degradation. The Court further stated that the State had admitted that there was significant degradation which equates to unreasonable degradation in this case because the Board of Environmental Review adopted a rule saying that any increase in a carcinogen, above background levels in the receiving water, is significant.

The statute was not struck down on its face. The Court held that the application of the statute in this case, unless the State can show a compelling state interest, resulted in an unconstitutional action. The Court did not hold that there is a fundamental right to no adverse change in the environment. Also, for other parameters such as toxic pollutants, other than carcinogens, the Court did not hold that the right to a clean and healthful environment is implicated any time there is a release in a concentration that is greater than what is found in the receiving water. The rule provides different standards for other constituents. For toxins, the rule states that a discharge is not significant if it doesn't increase the concentration in the receiving water by more than 15% of the water quality standard. For nutrients, it provides a numeric limit. The Court also did not strike the statute so it is still on the books and the DEQ continues to administer the statute.

Two days after the Court's decision, a lawsuit was filed against the department and the Yellowstone Pipeline Company by the Clark Fork Pend Oreille Coalition and other groups. The Yellowstone Pipeline Company was preparing to repair or replace the pipeline as it crosses the Clark Fork River at Turah. One count was based on the nondegradation provisions of the right to a clean and healthful environment. The department had issued an authorization to install the pipeline in accordance with certain procedures which allowed an exemption from the water quality standards for a temporary period of time. In 317(2)(q) there is an exemption from that process for those types of authorizations. The case is pending in Judge Sherlock's Court. A temporary restraining order has been issued. The company has agreed not to go forward with the project and the department will prepare a supplemental environmental analysis. A public hearing will be held in Missoula.

Another development is a challenge to the recent amendment that was granted by the department to the Golden Sunlight Mine. That case was close to final briefing when the Supreme Court decision in the Seven Up Pete Joint Venture case was handed down. Supplemental briefing is being prepared on the issue of the affect of the decision on the Golden Sunlight Mine case. The Plaintiffs are asserting that because of the right

to a clean and healthful environment, the department had to require a partial pit backfill of the pit as opposed to the no pit pond alternative. The allegation is that the department needed to show a compelling state interest to do so.

REP. CLARK remarked that an agency review of a project under MEPA will probably end up in court with the same arguments until MEPA can be considered as a substantive supplement where existing law does not cover particular situations. **Mr. France** maintained that the State will be on the strongest grounds for defending its decisions where it has good environmental information and takes that information into account in its decision making. The Legislature needs to be very careful about short changing that process. He further remarked that you can have thorough EISs, fast EISs, and cheap EISs but you cannot have all three together.

SEN. COLE questioned the quality of water in question. **Mr. North** explained that the drinking water standard applies to a public water supply. This is 50 parts per million for arsenic. This water, as it was being discharged in the environment, varied between the low 20s - 50s. It was close to drinking water standards and shortly down gradient it showed no detectible increases in arsenic.

REP. MOOD was concerned that based on a further extension of this ruling, there could be the potential of a lawsuit against a municipality for discharging sewage into a mixing zone. **Mr. France** believed there was general satisfaction with the MPDES permitting system for discharges to surface water. People are comfortable that the DEQ and the municipalities are applying appropriate technologies to clean the water. In those instances, a mixing zone is a reasonable solution. Insofar as discharges to surface waters, the only place a mixing zone can be used is after the water has been treated.

MR. STRAUSE questioned the possible ramifications of this decision on the procedural/substantive interpretations of MEPA. Also, he questioned whether it would affect the MEPA process if it were limited and did not apply to certain projects. **Mr. North** commented that the department would welcome clarification of the substantive/procedural issues involved in the MEPA process. Once the Legislature determined that the agency had authority to mitigate impacts, the question would be whether the Constitution required that in every instance the most environmentally protective alternative revealed in the EIS be chosen. **Mr. France** maintained that the Court is sending a strong message about categorical exemptions. If a project will have some environmental impact and a lawsuit ensues, the best defense is that it was studied and reviewed.

REP. CLARK understood the need for mixing zones but questioned how large a mixing zone could become before it would be considered a part of the environment and thereby be challenged. **Mr. North** explained that the concept of the mixing zone was a part of the case and was briefed quite extensively. The Court did not consider the matter. For nondegradation purposes, under the current rules, mixing zones are not allowed for carcinogens. The rules governing mixing zone rules contain criteria that uses can not be impaired. **Mr.**

France commented that the Federal Clean Water Act requires that for discharges into surface waters, the best available technology be used. In some instances, discharges would exceed water quality standards. In that situation, a mixing zone is an appropriate tool. The Federal Clean Water Act does not cover ground water. Montana has said that anything can be put into ground water without treatment.

Public Questions and Comment

Kathleen Williams, FWP, asked for more information on the other Supreme Court opinions. **Mr. France** explained that Justice Trieweiler authored the majority opinion. There were two concurring opinions by Justice Gray and Justice Leaphart. The concurring opinions all accepted the fundamental part of the ruling that the Constitution confers a fundamental right to a clean and healthful environment and that where water quality standards are violated that right is implicated and a high level of scrutiny as to the constitutionality of a statute is appropriate. Justice Leaphart suggested that the Supreme Court should declare the statute unconstitutional on its face. Justice Turnage agreed. Justice Leaphart and Justice Gray also dissented from the holding that the right to a clean and healthful environment also was implicated by private actions.

Jerome Anderson, lobbyist, asked for more information regarding the nondegradation process. He also questioned if the environmental community was considering reviewing all exemptions to test whether they were unconstitutional. **Mr. North** explained that the process involves an application to the DEQ for an authorization to degrade. The applicant needs to demonstrate that all technologically and economically feasible treatment alternatives are being implemented; that there is no other way of accomplishing the objective; that no use will be impaired; and that there are important social or economic goals that will be achieved by allowing the degradation to occur. If the applicant receives an authorization to degrade, the decision can be appealed to the Board of Environmental Review. To date, one application to degrade was applied for and this involved the Stillwater Mine. Litigation ensued and an authorization to degrade was not issued. He was not aware of any other applications. **Mr. France** maintained that the environmental community does not want theoretical rulings. Unless there is a set of facts that shows that the environment is being harmed by a presumably nonsignificant activity, litigation will not ensue.

Van Jamison remarked that MEPA contains a provision that gives weight to permitting statutes with respect to time. If you are required to issue a permit within 60 days, you are allowed 60 days to gather information. He questioned if the information gathered in that time isn't sufficient to illuminate the problems, will this ruling have any implications to that section of law. **Mr. North** clarified that the issue had been decided by the Montana Supreme Court in Cadillac v. Dept. of State Lands. At the time there was a 60-day time frame for permit decisions in the Montana Hard Rock Act. The department did the best job they could to prepare an EIS on an application to expand the mining area. The EIS was challenged as being inadequate. The Plaintiffs argued that because there is a right to a clean and healthful environment under the Constitution, MEPA should take precedence over the time limits in the permitting act and thereby the department should have all the time it needed. The Supreme Court held that MEPA was passed before the Constitution was adopted, therefore it did not have constitutional status and the 60-day period in the Hard Rock Act took precedence.

Mr. France added that if the inability to gather the information results in a bad decision and this is recorded by the department, there would be a constitutional problem.

(Additional handout - Supreme Court Opinion, MEIC, et al v. DEQ and Seven-Up Pete Joint Venture, **Exhibit 4.**)

VII LOCATION OF NEXT MEETING AND SCHEDULING

MR. EVERTS provided a handout showing tentative subcommittee/committee scheduling, **Exhibit 5.** The Council members approved the schedule.

It was noted that a meeting scheduled outside of Helena would include additional staffing costs. This could amount to $300 to $400 in additional costs per meeting. The Council decided that the benefits of traveling to other locations and receiving input from the public would outweigh the budget constraints. The extra meetings and work plan activities of the MEPA and Eminent Domain Subcommittees make it necessary to request a $25,000 supplement to the EQC budget. This request will be made to the Legislative Council at their January meeting.

The next meeting will be held in Missoula on January 21, 2000. The March meeting will be held in Billings. The remainder of the meetings will be in Helena.

VIII BUREAU OF LAND MANAGEMENT (BLM) PLANS FOR MANAGEMENT OF INCREASED RIVER RECREATION - LEWIS & CLARK BICENTENNIAL CELEBRATION

Kim Prill, Lewis and Clark Bicentennial Coordinator for the BLM, remarked that the BLM has stewardship responsibilities for over 300 miles along the Lewis and Clark Trail in Montana and Idaho. Estimates are that from 4 million to 25 million people are expected to come to Montana for the bicentennial. The BLM is working with the tourism departments in the trail states as well as other federal agencies that have jurisdiction responsibilities. Officially, the bicentennial will start on January 18, 2003 and end towards the end of September 2006. The BLM's biggest fear is that many people will want to be in a particular location at the same time to say that they were there. Strategic planning will help to divert visitor impacts. The six year bicentennial planning strategy ranges from 2001 to 2006.

She further noted that the Lewis & Clark Trail is a fragile resource in Montana. There is a fine balance between celebrating the state's cherished heritage and having these areas trampled. If there is a very sensitive site, it may be as simple as not putting some of the information on the map. The Lewis and Clark Trail Heritage Foundation will be working with private landowners and state and federal agencies to identify the areas where visitation can he handled and large numbers of people can be accommodated. They will also be

identifying the culturally sensitive sites. The atlas of Lewis & Clark has been recently reprinted and makes it possible for travelers to retrace the steps of Lewis and Clark.

The spirit of discovery can be fostered in a way that does not impact on-the-ground resources. Things that can be done include providing encampments, festivals, and symposiums. Their goals involve enhancing the visitor experience. This includes providing interpretative trails, toilets, and visitor information packages which will steer people to places that are not sensitive areas. Emergency services are a concern. They are working on local county cooperative agreements for law enforcement services, search and rescue, etc.

Native American involvement is a very significant issue. Had it not been for the contributions made by the Native Americans, the expedition may not have been a success. Native Americans have some issues with sacred and sensitive areas. There is a potential to form a Native American tourism alliance in Montana.

In regard to emergency and security services, the BLM does not have fund granting authority to pay for expenses such as volunteer fire department costs. The National Park Service has administrative authority over the trail and does have a granting program. The US Forest Service, through their rural economic development programs, has some mechanisms in place. The BLM will focus on the land restoration, protection, and visitor services as opposed to outright granting authority.

The BLM has been upgrading the infrastructure along the river system. Currently, with the landowners' permission, anyone can launch watercraft from most places along the river. Most of the white cliffs section of the Upper Missouri is privately owned. A special committee will form in January of 2000 and will specifically focus on river issues of the Upper Missouri. They will develop recommendations to help mitigate the impacts associated with increased recreation use on this portion of the river.

Increasing recreation use is becoming a paramount issue for persons living along the Marias River. The BLM manages only about ten miles along the river. Several years ago, the BLM proposed putting limited facilities at certain sites and met a great deal of objection. Since that time a local group has been established and they are looking at a level of appropriate development.

The Chain of Lakes Complex is one of the most used recreational use facilities. Over the past year there were 1.1 million visitors from the Wolf Creek Bridge to the Three Forks area. An increase in use of 3% to 5% is expected in the next couple of years. Devil's Elbow has recently been acquired and there is approximately $2.2 million worth of infrastructure development at that site. The Montana Power Company is a partner in this project. Most of the surrounding area is fully accessible. It is one of the few fee demo sites on the Lewis and Clark Trail in Montana. This means that the fees collected actually go back to the site for improvements and upgrades.

The US Forest Service, the FWP, and the BLM, together with local partners, are embarking on a Beaverhead planning area to identify options for visitors and perhaps some travel restrictions. The BLM recently acquired some tracts on the Beaverhead with a partner, Ducks Unlimited. It presents a great opportunity for interpretative trails and also provides some river access. Beaverhead Rock is designated as a primitive area and no new development can occur at the site.

The BLM recently acquired approximately 20 miles along the Blackfoot River Corridor. In 1976, the visitation to this site was 15,500 and in 1999 the visitation was 28,500. One possibility is to divert recreation off the river by converting an old railroad bed to a Rails-to-Trails Program.

Around the Billings area, the BLM manages approximately six miles of the Lewis and Clark Trail. The Sundance Recreations Area, Four Dances Natural Area, and Pompey's Pillar present wonderful opportunities to handle visitor use. There is a proposed interpretative center at Pompey's Pillar. On the Lower Yellowstone, the BLM manages approximately 60 miles of shoreline and islands. They are identifying pockets of appropriate development. There may be cooperation with the FWP to provide fishing access sites. Concerns include floater use and safety. The Yellowstone is an under-utilized area. Due to the presence of local communities along the trail, this may be an area in which to disburse some recreational activities.

The BLM has hosted a series of eleven public meetings this past summer. There were over 200 attendees and they have received about 100 written comments. The local field offices are developing a public affairs strategy. Even though the Park Service has management jurisdiction over the entire trail, fifty percent of the Lewis and Clark Trail is owned by private landowners. By using local grassroots efforts, a lot of the draw will be around festivals and activities within the communities.

The Lewis and Clark Trail Heritage Foundation has ten chapters across the state. There is a state and federal partnership called the Montana Tourism and Recreation Initiative. The National Bicentennial Council is headquartered out of Vancouver, WA. Both the House and Senate have Lewis and Clark Congressional Caucuses.

(Additional handout - slides of the presentation by **Ms. Prill, Exhibit 6.**)

SEN. TESTER questioned whether the BLM anticipated placing limits on the number of people floating the river. **Ms. Prill** affirmed that this is an issue. A feasibility study will be used to determine what level of visitation is appropriate in terms of the carrying capacity.

SEN. TESTER questioned whether the facilities the BLM was considering adding would be temporary. He further questioned whether agreements would be negotiated with local landowners in establishing these sites. **Ms. Prill** remarked that the actions taken will be as a result of the recommendations of the Resource

Advisory Council. Temporary facilities do make a lot of sense since there may be a large increase of visitation during the bicentennial period. They do not want to over develop the trail.

SEN. TESTER further inquired about possible new road construction. **Ms. Prill** remarked that there is no new road construction planned. Part of trying to keep the visitation down is to not provide direct access to the sites.

SEN. TESTER questioned whether the BLM would grant funds to county governments for law enforcement during this period. **Ms. Prill** explained that they anticipate local cooperative agreements where there will be needs for services. They are considering providing extra staff and partnering with the state in monitoring the area. A 2001 to 2006 Strategic Plan has been presented which includes a budget component recognizing the increased need for services of search and rescue and law enforcement.

SEN. MESAROS asked if there would be additional personnel or funding for road maintenance to address the impacts. **Ms. Prill** explained that road maintenance and improvements will be addressed by the Resource Advisory Council. There are cooperative agreements with the counties for maintaining some of the roads specifically around the Upper Missouri.

SEN. MESAROS requested that updates be provided. **Ms. Prill** agreed to provide updates to the EQC. The state provides a quarterly newsletter. The local stakeholders will be identified based on the corridors involved. She added that the legislators will be included on the stakeholder list.

SEN. COLE questioned the amount of additional funding requested for the project. **Ms. Prill** remarked that for the period 2001 to 2006, the BLM's budget package is approximately $25 million, with $16 million for Montana. This is a budget proposal and has not been approved or allocated.

REP. LINDEEN remarked that there had been some discussion regarding a rest area near Pompey's Pillar. She asked for further information on the status of this project. **Ms. Prill** clarified that this involves a potential partnership with the Department of Transportation. They are embarking on an environmental assessment to assess the impacts. The planning process should be completed in August of 2000.

REP. MOOD remarked that with 25 million people expected to visit during the Lewis and Clark Bicentennial there will be a major impact on the water quality of the Upper Missouri River. He questioned whether an environmental impact statement for the trail had been considered to formalize this study. **Ms. Prill** explained that this is not an agency initiated action. It is the result of an event. They do not know the exact numbers of visitors. As an agency, they can identify the carrying capacity limitations and then manage from that point.

REP. MOOD maintained that the State of Montana and the federal agencies are all promoting the bicentennial. He believed this could be challenged in court because an EIS had not been prepared. **Ms. Prill** maintained that for site specific projects they prepared EAs. Part of their strategic planning and preparation is to encourage people to visit where they are able to handle the impact.

SEN. MESAROS stated that if only half of the people expected to visit Montana actually did so, this has the potential of significantly impacting the natural resources of the State of Montana. He is not satisfied that an EIS is not being conducted on this project. **Ms. Prill** reiterated that they are conducting site specific EAs. She added that the National Park Service has authority over the trail.

SEN. MESAROS commented that EAs prepared on site specific projects would not give a comprehensive picture of the cumulative impacts.

IX COAL BED METHANE ISSUE UPDATE

Tom Richmond, Montana Board of Oil and Gas (BOG), stated that methane gas has always been a nuisance gas in coal mining. It is formed in the earth as a part of the coalification process which is a bacterial degeneration of organic material. The gas is trapped in the coal as it is formed. Ninety percent of gas is held within the coal bed by hydrostatic pressure. The coals in the Powder River Basin are lower in gas reserve potential than most of the other coal basins in the United States.

In order to make coal bed methane move within the cleat system, it is necessary to remove hydrostatic pressure from the coal. This is accomplished by continuously pumping water from the coal bed aquifer in order to change the characteristics of the reservoir to let this gas move out of the molecules. Wells need to be dewatered for a substantial period of time before the pressure is reduced enough so that the gas will start flowing out of the molecular structure and down the cleat system to the well. More gas can be stored in coal than can be stored in an equivalent amount of our conventional sandstone gas reservoirs. The estimated recovery of coal bed methane is approximately 50% to 70% of the gas in place by the natural depletion method of continuously reducing hydrostatic pressure. Technologies are being tested that will displace coal bed methane within the molecular structure with carbon dioxide gas or with nitrogen, both of which will displace the gas from the molecular structure.

Montana has approximately 220 wells permitted for Red Stone Gas Partners. There are six wells permitted for Enternet of Wyoming and one well permitted to Penaco. Wyoming has approximately 4,000 wells completed in coal bed methane. As of August of last year, there were approximately 8,000 coal bed methane wells in the country. Coal bed methane was supplying about 5.6% of the daily demand for natural gas. It is estimated that coal bed methane will form about 12% of the nation's reserves of natural gas. Natural gas is not easily imported, so our imports are limited to Mexico and Canada.

Jack Stults, Water Resources Division, Department of Natural Resources, remarked that the department's primary involvement with manipulation of water is water rights. The gas is connected to the coal. The water is moved away in order to change the pressure in the coal bed strata and then the gas migrates to the point of lowest pressure, which is the wellhead, and moves out. The water is a byproduct which means that the company developing the coal bed methane does not want to acquire a protectible interest in the water.

In Section 85-2-500, MCA, and above, there are statutes addressing controlled ground water areas. Section 510 specifically notes controlled ground water areas in relationship to the activities of gas and oil development. A controlled ground water activity area is fairly broad. An area is defined and the department has the authority to then place conditions on the manipulation of water in the area. The statutes provide for a controlled ground water area to be established where there is a potential for excess withdrawal. If this industry is fully developed, it has the potential for excess withdrawal. Excess would mean significant impacts to either existing water users or the resource itself. The department proposed putting in place a controlled ground water area. They are working in partnership with the BOG and are close to a final decision. He referred to the draft order they are proposing, **Exhibit 7**. He further referred to a document entitled, "Proposed Extent of the Powder River Basin Controlled Groundwater Area", **Exhibit 8**. The order would only apply to coal bed wells. The department is proposing that when applying for the initial permit from the BOG, a company characterize the existing water sources, both underground and surface. People in the area need to be notified that an application has been filed so they can participate in the public process of determining whether a permit should be issued. In the development phase, there is a requirement that there be a certain level of monitoring the amount of water taken out. This monitoring needs to provide credible data. In Wyoming, the wells are averaging between 6 to 12 gallons a minute when in full production.

The order also requires that the producer offer a mitigation contract to the landowner with the water right. Within one half of a mile from a producing well, any well or spring impacted will be corrected with no questions asked. A technical advisory committee will review the development applications and make recommendations on the monitoring scheme. Also, they will review the data to determine whether mitigation adjustments are needed.

Art Compton, DEQ, commented that their concerns with coal bed methane are with water quality and the environmental effects of regional development in southeast Montana. Much of the coal aquifer waters in the Powder River Basin are high in total dissolved solids (TDS). The waters generally exceed recognized standards for irrigation. There is a limit to how much of this water can be discharged to small tributaries that are used for irrigation in the summer months. The nondegradation requirements contain only a narrative standard for TDS. One standard is that it cannot impair an existing use. This discharge does not require a state permit but does require nondegradation review. During the last legislative session, SB 499 reestablished the requirement for review under the nondegradation law for unaltered ground water discharge.

With respect to the Red Stone wells, only 10% have been built. They have submitted an MPDES application, even though it is not required under law. The department has not taken any action on the Red Stone permits. The BLM is preparing an environmental assessment for the first phase of coal bed methane development in southeast Montana. The EA is addressing 113 wells on federal lands. The BLM is proposing consideration of the effects of 220 wells. The 113 wells on federal lands require 401 certification by the state. This is the process by which the state affirms that a federal action will comply with state water quality standards.

In their comments, the DEQ pointed out that the 401 certification requires DEQ's participation; it recommended that the department be a cooperating agency in the production of the EA; and identified a host of issues not covered in the internal review draft EA. Due to the significant effects, an EIS may be required rather than an EA to support state permitting. The coal bed methane wells would also require a storm water permit. This is an application of best management practices for erosion control during construction. The well development would disturb more than five acres. Any impoundments that are built to contain the discharge water would require a storm water permit as well.

The continued discharge of saline water into small diversions in an area that is arid and has a high evaporation rate will cause the water quality in those impoundments to degrade as evaporation occurs and the salts are concentrated. There is a concern that the water may be unsafe for livestock. The life of a coal bed methane development is approximately 15 years. At the end of that period, there is likely to be a fair amount of salt deposited in and adjacent to the impoundments.

REP. TASH questioned whether the recharged water would contain the same degree of salinity. **Mr. Stults** remarked that the intent is not to completely dewater the aquifer. For an isolated well, recharging can take the length of time that it was pumping. He was not sure of the water quality ramifications.

MR. STRAUSE questioned whether the monitoring would be ongoing. **Mr. Richmond** explained that the coal bed methane operators are required to report, on a monthly basis, to the BOG. The impoundments are permitted as production pits which require water analysis.

REP. LINDEEN asked for more information on the public hearings that had been held. **Mr. Stults** remarked that four public hearings were held in Lodge Grass, Colstrip, Miles City and Broadus. These meetings were very well attended. Most of the comments were in favor of the controlled ground water area. There were two major concerns. One was that the coal bed methane development would take away existing water sources for stock water. Another concern was that the government would interfere with an economic benefit to an area that is in need of the same. There also was concern regarding the sufficiency of a ½ mile radius around the development well. This is a presumed zone of influence that is well established in regulatory activity.

(Additional handouts - Ground Water Production from Coal Bed Methane in the State of Wyoming, **Exhibit 9**, Draft of DNRC findings re: Coalbed Methane, **Exhibit 10**, and Correspondence from Decker Coal Company to the EQC, **Exhibit 11**.

X OTHER BUSINESS

CHAIRMAN CRISMORE appointed REP. GUTSCHE as Vice Chairman of the Eminent Domain Subcommittee.

XI ADJOURNMENT

There being no further business, the meeting adjourned at 3:00 p.m.

_____

SEN. CRISMORE, Chair